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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

IRVING SULMEYER, CHAPTER 11 TRUSTEE,
Petitioner,

v.

PACIFIC BMW,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

1. 11 U.S.C. § 547(b) provides that a bankruptcy trustee or debtor in possession may avoid preferential transfers, subject to certain exceptions enumerated in 11 U.S.C. § 547(c). Did the Ninth Circuit err in applying state laws pertaining to rescission to a transfer which was otherwise preferential under 11 U.S.C. § 547(b)?

2. Are state laws involving rescission preempted by 11 U.S.C. § 547(b)?

3. Does the proper administration of bankruptcy estates require the Supreme Court to resolve the conflict that exists between the Ninth Circuit, on the one hand, and the Second and Tenth Circuits, on the other hand, concerning the application of state based rescission laws to federal bankruptcy laws relating to preferential transfers?

LIST OF PARTIES

The parties to the proceeding below are the Petitioner, Irving Sulmeyer, chapter 11 trustee of Grand Chevrolet, Inc., Grand Motors, Inc., Grand Wilshire Finance Corporation, Grand Rizal Finance Corporation, and Grand Wilshire Capital, Inc. (collectively "Debtors")* and the Respondent, Pacific BMW.

Each of the Debtors are California corporations who were engaged in selling and financing motor vehicles through 1988 in California.

Pacific BMW is a tradestyle used by Finchey Corp. of California, a corporation organized under the laws of the State of California.

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* Grand Chevrolet, Inc. is the parent corporation of Grand Motors, Inc., Grand Wilshire Finance Corporation and Grand Rizal Finance Corporation. One hundred percent (100%) of the stock of Grand Chevrolet, Inc. was held by Eminano Jun Reodica. Non-debtor subsidiaries of Grand Chevrolet, Inc. include Grand Wilshire Marketing, Inc., Grand Wilshire Credit Corp., Grand Wilshire Leasing, Inc., Grand Wilshire Development, Inc., Grand Wilshire Development, Ltd., Grand Wilshire Investment Equity, Grand Wilshire Investment, Inc., Grand Wilshire Leasing, Ltd., and Grand Wilshire Office Automation, Inc.

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PACIFIC BMW,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Irving Sulmeyer, chapter 11 trustee, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 2, 1994.

OPINIONS BELOW

The June 2, 1994 Memorandum of the Court of Appeals for the Ninth Circuit affirms the judgment of the United States District Court for the Central District of California which reversed the judgment entered by the

United States Bankruptcy Court for the Central District of California. The Ninth Circuit Court of Appeals' Memorandum is not published. It is reprinted as Appendix A to this petition, at 1a.

On September 3, 1992, the United States District Court for the Central District of California entered its Decision on Appeal and Judgment: (1) reversing the judgment of the United States Bankruptcy Court for the Central District of California insofar as it granted judgment in favor of the Petitioner against Respondent; and (2) granting summary judgment in favor of Respondent against Petitioner. The United States District Court for the Central District of California Decision on Appeal and Judgment was appealed by the Petitioner to the Court of Appeals. The United States District Court for the Central District of California Decision on Appeal and Judgment is not published. It is reprinted as Appendix B to this petition, at 7a.

On September 1, 1992, the United States District Court for the Central District of California filed its Findings of Fact and Conclusions of Law in support of its Decision on Appeal and Judgment which were appealed by the Petitioner to the Court of Appeals. The United States District Court for the Central District of California's Findings of Fact and Conclusions of Law is not published. It is reprinted as Appendix C to this petition, at 9a.

On February 3, 1992, the United States Bankruptcy Court for the Central District of California entered its Summary Judgment granting summary judgment in favor of the Petitioner against Respondent. The United States Bankruptcy Court for the Central District of California's Summary Judgment was appealed by the Respondent to the United States District Court. The United States Bankruptcy Court for the Central District of California's Summary Judgment is not published. It is reprinted as Appendix D to this petition, at 20a.

On February 3, 1992, the United States Bankruptcy Court for the Central District of California entered its Findings of Fact and Conclusions of Law in support of its Summary Judgment which was appealed by the Respondent to the United States District Court for the Central District of California. The United States Bankruptcy Court for the Central District of California's Findings of Fact and Conclusions of Law is not published. It is reprinted as Appendix E to this petition, at 22a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 2, 1994, affirming the judgment in favor of the Respondent entered by the United States District Court for the Central District of California which reversed the judgment of the United States Bankruptcy Court for the Central District of California. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves issues of preemption and the Ninth Circuit's erroneous reliance on state laws involving rescission that conflict with 11 U.S.C. § 547(b) of the Bankruptcy Code. Petitioner, a duly appointed chapter 11 trustee, seeks to avoid preferential transfers of motor vehicles on the eve of the debtor's bankruptcy. 11 U.S.C. § 547(b) provides:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor for such transfer;
>
> (3) made while the debtor was insolvent;
>
> (4) made—

(A) on or within ninety (90) days before the filing of the petition; or

(B) between ninety (90) days and one year before the date of a filing of the petition, if such creditor at the time of such transfer was an insider and;

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

STATEMENT OF THE CASE

This case involves an issue of grave importance to the administration of any bankruptcy case in which potential actions exist to avoid preferential transfers. Since adversary proceedings seeking avoidance of preferential transfers are frequently filed by trustees and debtors in possession, the outcome of this case has a wide reaching impact.

The disputed issue in this case is that the Ninth Circuit applied state laws involving rescission, rather than federal preference laws, just as it had done in 1988 when it reached its erroneous holding under *Griffel v. Murphy (In re Wegner)*, 839 F.2d 533 (9th Cir. 1988). In both the instant case and *Wegner*, the Ninth Circuit reasoned that the contract between the debtor and creditor was "executory" and that the contract was rescinded by the parties prior to the filing of the bankruptcy; therefore, the court found there was no interest which belonged to either debtor at the time of the filing of their respective bankruptcies.

As discussed below, Petitioner believes the Ninth Circuit erred, because its decision results in validating acts

which would otherwise be voided as preferential transfers under the Bankruptcy Code. The Ninth Circuit's ruling would also allow debtors and creditors to guise a transfer which is otherwise preferential, as a rescission of their mutual obligations.

Additionally, *Wegner* is in conflict with *Butner v. United States et al.*, 440 U.S. 48, 99 S.Ct. 914 (1978). According to *Butner*, state laws which conflict with federal laws on preferential and fraudulent transfers are preempted. *Id.* at pages 54-55. The Court of Appeals in the Ninth Circuit apparently believes it is bound by the *Wegner* decision, notwithstanding the fact that it never addressed the holding in *Butner*.

The Bankruptcy Court which originally heard cross motions for summary judgment in this case found that the self-help repossession by the Respondent in this case was a preferential transfer, and granted Petitioner's motion for summary judgment on these same issues. Respondent then appealed to the United States District Court, which reversed the Bankruptcy Court's order, insofar as it granted the Petitioner's summary judgment and then granted judgment in favor of Respondent. The Court of Appeals for the Ninth Circuit, relying upon its earlier decision of *Wegner* affirmed the District Court's ruling. Wherefore, Petitioner brings this petition for certiorari before this Court.

REASONS FOR GRANTING CERTIORARI

The issue of whether state based rescission laws can be used to circumvent federal preference laws impacts many of the bankruptcy cases filed in the United States each year due to the significant number of preferential transfers sought to be avoided by bankruptcy trustees and debtors in possession.

Such chaos in the already impacted bankruptcy court system can be avoided by simply recognizing that federal laws preempt conflicting state statutes in matters involv-

ing preferential transfers. The holdings of the Ninth Circuit Courts of Appeals permitting rescission of an otherwise preferential transfer under 11 U.S.C. § 547(b) are in contravention of this Court's holding in *Butner v. United States et al.*, 440 U.S. 48, 99 S.Ct. 914.

Moreover, the bases upon which the Courts of Appeals in two circuits have found preferential transfers where a rescission purportedly occurred are conflicting. Thus, there is no predictable standard upon which trustees and debtors in possession may rely for the uniform treatment of their preference actions under Federal Bankruptcy Laws. Finally, the issue presented in this case has such a wide reaching impact upon the administration of bankruptcy cases and the dockets of the bankruptcy court system that certiorari should be granted because the Ninth Circuit has, in effect, created a loophole for creditors to avoid the impact of preference laws by causing or motivating the debtor to enter into a rescission and/or cancellation of a transaction prior to the filing of the debtor's bankruptcy.

I. THE DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS VIOLATE THE *BUTNER* DECISION AND CONGRESS' INTENT IN ENACTING THE BANKRUPTCY CODE

In *Butner v. United States et al.*, 440 U.S. 48, 99 S.Ct. 914 (1978), the United States Supreme Court upheld the supremacy of the uniform laws on the subject of bankruptcy throughout the United States over state laws that are in "actual conflict". Despite its clear and unambiguous ruling, the Ninth Circuit in *Griffel v. Murphy (In re Wegner)*, 839 F.2d 533 (9th Cir. 1988), failed to follow the *Butner* ruling. *Wegner* is erroneous in its conclusion and the Ninth Circuit's reliance upon *Wegner* in the instant case compounds their mistake. For this reason, the *Wegner* case should be overturned.

In *Butner* the Supreme Court declared:

> The Federal Constitution, Article I, § 8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. While this is true, state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress. *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213. *Butner v. United States et al.*, 440 U.S. 48, 54-55; 99 S.Ct. 914 (1978)

The Supreme Court also declared that, ". . . the federal statutory basis for treating fraudulent and preferential transfers in order to protect general creditors applies to both security interests and other interests in property." *Id.* at page 55.

It is a well established doctrine that federal laws enacted by Congress preempt state law where there is an actual conflict, because Article VI, section 2 provides that the Federal Constitution and laws of the United States made pursuant thereto "shall be the Supreme Law of the Land." *Wegner* defies this doctrine by declaring that a "rescission" accomplished under state law is not subject to avoidance as a preferential transfer pursuant to 11 U.S.C. § 547(b) [*See Griffel v. Murphy (In re Wegner)*, 839 F.2d 533, 538-539 (9th Cir. 1988)] despite the fact that the transfer falls squarely within the parameters of that statute. Adherence to the *Wegner* case will result in an irreconcilable conflict with federal bankruptcy laws and Congress' intent:

> A fundamental goal of bankruptcy preference litigation is the equality of distribution of creditors in the settlement of their claims. H.R. Rep. No. 95-595, 95th Cong., 1st Sess., 177, 178 (1977).

Based on the above analysis, the Ninth Circuit Court of Appeals decision is inconsistent with the Supreme Court's ruling in *Butner* as well as Congress' stated goals for enacting preference laws. Therefore, the Ninth Circuit erred in the instant matter.

II. THE BASIS UPON WHICH THE NINTH CIRCUIT AFFIRMED THE DISTRICT COURT'S JUDGMENT IS WRONGLY DECIDED

As discussed above, the Ninth Circuit relied upon its prior decision of *Griffel v. Murphy (In re Wegner)*, 839 F.2d 533 (9th Cir. 1988), in analyzing the issues in the instant case. The essential facts in *Wegner* are as follows: Mr. Wegner, prior to filing for bankruptcy, leased appellant's land in Montana and entered into a contract on February 1, 1982, to purchase cattle and machinery. The contract was for a term of five years with a down payment of $4,000 and annual payments of $40,000 plus principal and interest beginning July 1, 1984. Mr. Wegner was unable to make the entire installment payment due on July 1, 1984 and was in default of this payment. On December 10, 1984, Mr. Wegner remitted $17,839.01 with a letter informing the appellant that he was in the process of filing for bankruptcy. Mr. Wegner also requested appellant to take over the feeding of the cattle. Mr. Wegner also had electric accounts on electric meters switched over to appellant's name. *Griffel v. Murphy (In re Wegner)*, 839 F.2d 533, 535 (9th Cir. 1988).

Mr. Wegner filed on January 3, 1985 for relief under bankruptcy. The trustee in bankruptcy filed adversary actions to void two preferences: the transfer of debtor's interest in cattle and machinery to appellant in December 1984 and the $17,839.01 debtor paid appellant on December 10, 1984. *Id.*

Wegner was decided on the basis of whether the contract for the sale of cattle and machinery was an executory contract, within the meaning of the Bankruptcy Code. The court reasoned that the contract was indeed an exe-

cutory contract, and that the contract was rescinded by the parties prior to the filing of the bankruptcy and, therefore, there was no interest which belonged to the debtor at the time of the filing of the bankruptcy. *Id.* at pages 538-539. The Ninth Circuit Court of Appeals analyzed the lower court's conclusion of law regarding the executory nature of the cattle and machinery contract and determined that the bankruptcy court erred in its analysis because it found the duty to provide a bill of sale to be an unperformed material obligation and therefore the contract was supposedly executory. *Id.* at 537. Furthermore, the Ninth Circuit held that the contract in question was effectively terminated by the parties under Montana state law and was, therefore, no longer executory. *Id.* at 538.

In the *Pacific BMW* case, the Debtors received possession of thirteen (13) BMW vehicles between July 6, 1988 and July 10, 1988. Pursuant to a purported written agreement between the Debtors and Pacific BMW, Pacific BMW repossessed or picked up the thirteen (13) BMW vehicles around July 28, 1988.

Accordingly, all of the "transfers" occurred on or about July 28, 1988, well within the ninety day preference measuring period from the filing dates of the petitions by Grand Chevrolet, Inc. and Grand Motors, Inc. on August 5, 1988 and August 8, 1988, respectively. Without addressing 11 U.S.C. § 547(b), the Ninth Circuit, following its prior holding in *Wegner,* found that each of the sales of the thirteen vehicles were "executory" under state law, and that the contracts were rescinded by the Debtors and Pacific BMW prior to the filing of the bankruptcy; and therefore, held there was no interest which belonged to the Debtors at the time of the filing of their bankruptcies.

The Ninth Circuit's holdings in *Wegner* and *Pacific BMW* result in validating acts which would otherwise be voided as preferential transfers under the Bankruptcy Code. This would allow creditors to guise a transfer

which is preferential as a rescission of their mutual obligations.

Even the dissenting opinion in the *Wegner* decision recognizes that the Ninth Circuit is promoting a loophole that undermines Congress' intent in enacting preference laws: "Moreover, a decision in Pacific's favor will encourage creditors to chase after insolvent debtors in an effort to get back goods sold on credit by 'rescinding' their contracts." *See* Memorandum attached as Appendix A, Dissenting Opinion, page 6a in *Sulmeyer v. Pacific BMW (In re Grand Chevrolet, Inc.)*. Also, this same dissenting opinion notes that adherence to the *Wegner* case will result in an irreconcilable conflict with federal bankruptcy policies: "Equal division of the assets of a debtor among creditors would be defeated if the debtor could pick and choose among them and then file bankruptcy *or if one creditor seized property* or obtained an involuntary lien such as by attachment. *Id.* at page 3 quoting 2 *Cowans Bankruptcy Law & Practice* § 10.7 (1986) (Emphasis added in Dissenting Opinion).

Even if the *Wegner* court correctly decided that the contract was executory and was validly rescinded by the parties, such a rescission results ultimately in a preferential transfer to a creditor. This scenario was contemplated in *Butner*, which found that an act which is valid under state law, but results in an act which is invalid under federal law, is in actual conflict and should be interpreted by federal laws.

The Ninth Circuit's decision in the instant matter runs contra to the policy underlying bankruptcy laws. Whether there was a transfer of the property of the Debtors to Pacific BMW is clear under the Bankruptcy Code: 11 U.S.C. § 101(54) defines a transfer as "every mode . . . of disposing of . . . property . . . or an interest in property." Applying § 101(54) to the facts of this case, there can be no question but that the Debtors had an interest in the thirteen BMW's in its possession and that the bankrupcy court correctly ruled that Pacific BMW's re-

possession of the thirteen vehicles on July 28, 1988 from Debtors' premises constituted transfers of property of the Debtors. A trustee's ability to void preferential transfers allows and facilitates the ultimate goals of the preferential transfer statutes. Accordingly, this court should find that the Ninth Circuit erred in this case.

III. THE NINTH CIRCUIT DECISION IS INCONSISTENT WITH TWO OTHER CIRCUITS

This issue is ripe for review by the Supreme Court of the United States. The circuits are split on this issue; the Ninth Circuit argues that a rescission prior to bankruptcy is not considered to be a preferential transfer. However, the Second Circuit explains in *Philip Marks v. Goodyear Rubber Sundries, Inc.*, 238 F.2d 533, 534 (1956):

> Hence it is obvious that return and acceptance of the merchandise was a preferential transfer, as defined in § 60, sub. a of the Bankruptcy Act, and the only question for decision is whether it was a voidable preference, as defined in § 60, sub. b, 11 U.S.C.A. § 96.

Thus, according to *Marks*, the return of merchandise is a preferential transfer under the predecessor statute to 11 U.S.C. § 547 and cannot be voided unless there is an exception that is applicable. The only exceptions to voiding a preferential transfer are listed in Section 547(c).

The *Marks* holding is similar to the Tenth Circuit's ruling in *Colacci's of America, Inc.*, 490 F.2d 1118, 1121 (1974), where the court states:

> This as a "remedy" of the seller is unrealistic in the face of the filing of the petition for bankruptcy within four months thereafter. The "cancellation" by retaking the goods could not be effective because whatever the action is called, it was still a "transfer" within the meaning of the Bankruptcy Act "for or on account of an antecedent debt" within four months of the filing of the bankruptcy petition.

Thus the Tenth Circuit takes the view that despite how you phrase the transaction of taking back merchandise, or repossessing or of cancelling a contract, the act itself is a transfer and that such acts are voidable under the Bankruptcy Code.

Wegner is inconsistent with *Marks* and *Colacci's*. The Ninth Circuit merely decided to ignore the application of preference law by addressing whether the contract to sell cattle and machinery was an "executory contract". This court should resolve these conflicting decisions and require lower courts to apply federal preference laws, notwithstanding the existence of state laws pertaining to rescission.

CONCLUSION

WHEREFORE, Petitioner, Irving Sulmeyer, chapter 11 trustee, prays that a writ of certiorari issue from This Honorable Court to review the judgment of the Court of Appeals for the Ninth Circuit in *IRVING SULMEYER, CHAPTER 11 TRUSTEE v. PACIFIC BMW (In re Grand Chevrolet, Inc., etc.)*. In the event that the petition is granted, Petitioner prays that the judgment of the Court of Appeals for the Ninth Circuit be reversed and that a mandate issue granting judgment in favor of the Petitioner.

Respectfully submitted,

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Dated: August 30, 1994

APPENDIX

APPENDIX A

[Filed Jun. 2, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 92-56267

D.C. No. CV-92-1393-DT

IN RE: GRAND CHEVROLET, INC., and related entities, including: GRAND MOTORS, INC.; GRAND WILSHIRE FINANCE CORPORATION; GRAND WILSHIRE CAPITAL, INC.,

Debtors.

IRVING SULMEYER, Chapter 11 Trustee,
Plaintiff-Appellant,

v.

PACIFIC BMW,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, Jr., District Judge, Presiding

Argued and Submitted March 7, 1994
Pasadena, California

MEMORANDUM *

Before: FARRIS, RYMER and KLEINFELD, Circuit Judges

Trustee Irving Sulmeyer appeals the granting of summary judgment to Pacific BMW. The district court held that the transfers of 13 vehicles from the debtor to Pacific BMW were not preferential under 11 U.S.C. § 547(b). We have jurisdiction under 28 U.S.C. §§ 158(d) and 1291. We review de novo. *In re Food Catering & Housing, Inc.*, 971 F.2d 396, 397 (9th Cir. 1992).

Pacific BMW argues 1) that the purchase agreements were executory; 2) that the parties rescinded the purchase agreements prior to the filing of the bankruptcy petition, and 3) that the debtor therefore did not have an "interest" in the vehicles when they were repossessed by Pacific BMW. We agree.

Whether a contract is executory under the Bankruptcy Code is a question of federal law. *In re Wegner*, 839 F.2d 533, 536 (9th Cir. 1988). A contract is executory where "the obligations of both parties are so far unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other." *Id.* Whether a party's failure to perform a remaining obligation under a contract would give rise to a material breach is a question of state law. *Id.*

The debtor had yet to perform a material obligation under the purchase agreements—it had not yet paid for the vehicles. Pacific BMW contends that it too had not performed its material obligations because it had not complied with mandatory statutory provisions of the California Vehicle Code. Section 4456 of the Vehicle Code provides that

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

> When selling a vehicle, dealers and lessor-retailers shall use numbered report-of-sale forms issued by the department. The forms shall be used in accordance with the following terms and conditions:
>
> . . . .
>
> (2) The dealer or lessor-retailer shall submit to the department an application . . . for registration or transfer of registration [of the vehicles].

Cal Veh. Code § 4456. Pacific BMW did not submit an Application for Registration of New Vehicle, also referred to as a "Report of Sale", to the Department of Motor Vehicles with respect to any of the vehicles. Instead, the parties contemplated that the Reports of Sale would be transferred to the debtor when payment was received. Without submission of the Reports of Sale to the DMV, the vehicles could not have been properly registered under the Vehicle Code. The failure to register a vehicle with the DMV is a violation of Cal. Veh. Code § 4000. Thus, had the debtor performed its contractual obligations (i.e. paid for the vehicles), Pacific BMW's failure to turn over the Reports of Sale would have amounted to a material breach.[1] Since both the debtor and Pacific BMW had yet to perform material obligations under the purchase agreements, the agreements were executory.

We must next decide whether the parties rescinded the purchase agreements. California law provides that a contract may be rescinded if all parties thereto consent. Cal. Civ. Code § 1689(a). The "mutual cancellation of executory contractual rights" is sufficient consideration to extinguish the obligations created by a written contract.

---

[1] Because we hold that Pacific's failure to comply with the registration requirements of the Vehicle Code would amount to a material breach, we do not address Pacific BMW's argument that under Cal. Veh. Code § 5600(b), its failure to convey the Reports of Sale to the debtor prevented title to the vehicles from passing to the debtor.

See Sass v. Hank, 238 P.2d 652, 658 (Cal. Dist. Ct. App. 1952). On July 28, 1988, Pacific BMW's president, David Ho, learned from the debtor's general manager that the debtor would be unable to pay for the vehicles. Ho made arrangements with the debtor to repossess the vehicles later that day. The debtor's employees assisted Pacific BMW employees in removing the vehicles from the debtor's lot. These facts establish that the parties intended to mutually rescind the purchase agreements prior to the repossession of the vehicles. In so doing, each party gave up its contractual rights under the purchase agreements. The rescission was effective under California law.

To constitute a preferential transfer, the transfer must be of an "interest of the debtor in property." 11 U.S.C. § 547(b). The mutual rescission of the executory agreement left the debtor without an "interest" in the vehicles. *In re Wegner,* 839 F.2d at 538-39. The trustee has therefore failed to establish that there was a "transfer of an interest of the debtor in property." 11 U.S.C. § 547(b).

AFFIRMED

KLEINFELD, Circuit Judge, Dissenting:

I respectfully dissent.

Glessner v. Massey-Ferguson, Inc., 353 F.2d 986, 992 (9th Cir. 1965), appears to me to require a different result. There, Massey-Ferguson sold farm equipment to the bankrupt, reserving an unperfected security interest until full payment. Before the bankruptcy filing, while the bankrupt was insolvent, Massey-Ferguson took the machinery back. We treated the repossession as perfection of a security interest. *See* U.C.C. § 9-305. Because Massey-Ferguson got more by repossession than it would have gotten by sharing in the estate with other creditors, the repossession was a preference. It was like giving an unsecured creditor a security interest before filing bankruptcy. When Pacific repossessed the 13 BMW's one week before Grand filed for bankruptcy, it perfected its secret lien and received a preference.

Wegner seems to me to be distinguishable. Under Montana law, the more specific statute on cattle transactions controlled over the more general provision in the Uniform Commercial Code. Montana made it unlawful, not just ineffective, to transfer branded cattle without a bill of sale, to prevent cattle rustling. A Montana creditor would not be misled by bare possession, as would generally be the case, because cattle are branded, and as *Wegner* points out, a brand is prima facie evidence of ownership. The Montana statute prevented title from passing unless the cattle were inspected for brands and a bill of sale was signed and presented by the seller to a livestock inspector. *Wegner*, 839 F.2d at 536.

The Montana cattle statute makes *Wegner* distinguishable. The U.C.C. rule is that title passes upon physical delivery of the goods, unless otherwise explicitly agreed. U.C.C. § 2-401(2); Cal. Com. Code § 2401 (West 1964). The U.C.C. applies, not the California Vehicle Code, for dealer-to-dealer transfers of inventory. Vehicle Code §§ 5600, 5906. *Louis & Diedrich, Inc. v. Cambridge*

European Imports, Inc., 234 Cal. Rptr. 889, 895 (Ct. App. 1987).

Wegner says that when the sales agreement was rescinded, "the property would have automatically reverted back to appellant, leaving [the estate] with no interest in the property." 839 F.2d at 537. The only reason the property would revert back to the seller is that the seller had title under that specific Montana statute. Under the U.C.C., the buyer has title, so the property cannot revert back as in *Wegner*.

Glessner is a routine application of the general policies of preference law, while *Wegner* is exceptional. We should keep it that way. "Equal division of the assets of a debtor among creditors would be defeated if the debtor could pick and choose among them and then file bankruptcy *or if one creditor seized property* or obtained an involuntary lien such as by attachment." 2 *Cowans Bankruptcy Law & Practice* § 10.7 (1986) (emphasis added). We have said that preference law prevents insistent creditors from getting more than their fair share by transfers on the eve of bankruptcy. *DuBay v. Williams*, 417 F.2d 1277, 1288 (9th Cir. 1969).

Allowing Pacific to take back the cars it sold to Grand on credit undermines these policies. Grand allowed Pacific to get the full benefit of its secret lien. This benefit prejudiced other creditors who may have relied on the fact that Grand had a lot full of cars (with no recorded security interest) when they extended credit to Grand. Moreover, a decision in Pacific's favor will encourage creditors to chase after insolvent debtors in an effort to get back goods sold on credit by "rescinding" their contracts.

APPENDIX B

[Filed Sep. 1, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 92-1393-DT

IN RE GRAND CHEVROLET, INC., and
RELATED ENTITIES,
Debtors.

IRVING SULMEYER, chapter 11 trustee,
Plaintiff-Appellee,
vs.
PACIFIC BMW,
Defendant-Appellant.

DECISION ON APPEAL AND JUDGMENT

The matter of the appeal of the judgment entered by the United States Bankruptcy Court for the Central District of California in the case of *Sulmeyer v. Pacific BMW (In re Grand Chevrolet, Inc.)*, LA90-01730-CA, entered on February 3, 1992 (the "Summary Judgment") was heard by this Court on August 17, 1992. At the hearing, defendant and appellant Pacific BMW ("Pacific BMW") appeared through its counsel Buchalter, Nemer, Fields & Younger, A Professional Corporation, by Pamela Webster. Plaintiff and appellee Irving Sulmeyer, the chapter 11 trustee in the bankruptcy case of Grand Chevrolet, Inc. (the "Trustee"), appeared through his counsel

Sulmeyer, Kupetz, Baumann & Rothman, by Steven Wainess.

Having considered the papers filed in connection with the appeal of the Summary Judgment, argument of counsel at the hearing, this Court having made its Findings of Fact and Conclusions of Law contemporaneously with this Judgment, good cause appearing, it is

ORDERED, ADJUDGED AND DECREED that the Summary Judgment insofar as it granted judgment in favor of the Trustee and against Pacific BMW is reversed; and it is

FINALLY ORDERED, ADJUDGED AND DECREED that summary judgment is hereby granted in favor of Pacific BMW and against the Trustee.

DATED: Sep. 1, 1992

/s/ Dickran Tevrizian, Jr.
DICKRAN TEVRIZIAN, JR.
United States District Judge

APPENDIX C

[Filed Sep. 1, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV92-1393-DT

IN RE GRAND CHEVROLET, INC., and
RELATED ENTITIES,
Debtors.

IRVING SULMEYER, chapter 11 trustee,
Plaintiff-Appellee,
vs.
PACIFIC BMW,
Defendant-Appellant.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The undersigned United States District Judge, in support of the Decision on Appeal and Judgment entered concurrently, makes the following Findings of Fact and Conclusions of Law in accordance with Federal Rule of Civil Procedure 52 and Federal Rule of Bankruptcy Procedure 7052.

FINDINGS OF FACT

1. Pacific BMW is a dealer of BMW brand automobiles.

2. Prior to the commencement of its bankruptcy case, Grand Chevrolet, Inc. ("Debtor") was in the business of

buying automobiles from other dealers such as Pacific BMW and reselling them to consumers.

3. Prior to the commencement of Debtor's bankruptcy case, it and Pacific BMW had done business together for at least six years.

4. Between July 6, 1988 and July 10, 1988, Pacific BMW sold thirteen BMW brand automobiles (the "BMWs") to Debtor.

5. Each sale of the BMWs was documented with a "Motor Vehicle Purchase Order and Disclosures Required by Federal Law" signed by Pacific BMW and by Debtor (the "Purchase Agreements").

6. The Purchase Agreements listed obligations of Debtor to Pacific BMW, including the obligation to pay for the Automobiles.

7. The Purchase Agreements also listed obligations on the part of Pacific BMW, including the duty to refund a portion of the purchase price and fees paid under certain circumstances.

8. Under California Vehicle Code §§ 4456 and 5901, Pacific BMW was obligated to file a Notice of Sale with the California Department of Motor Vehicles (the "DMV") for each of the BMWs sold within five days of the sale or face a fine.

9. Under California Vehicle Code §§ 4456 and 5600, Pacific BMW was obligated to deliver an Application for Registration of New Vehicle, which is known in the automobile industry as a Report of Sale, to the DMV for each of the BMWs.

10. Reports of Sale are different documents from Notices of Sale. Reports of Sale contain information that a Notice of Sale does not contain, such as the name and address of the legal or lien holder. This information is required by law to be submitted to the DMV under California Vehicle Code § 4150.

11. It is the practice of Pacific BMW that both Notices of Sale and Reports of Sale are filed with the DMV in order to comply with California Vehicle Code § 4456.

12. Pacific BMW timely filed Notices of Sale for the BMWs.

13. Although a Notice of Sale may not be necessary if a Report of Sale is filed within five days of the sale of an automobile, under the California Vehicle Code a Notice of Sale cannot be filed in lieu of a Report of Sale.

14. The filing of a Report of Sale is a material obligation of a seller of automobiles.

15. California Vehicle Code § 5600(b) states that title to an automobile does not pass unless the transferor has delivered or mailed to the DMV the appropriate documents for the registration of new vehicles.

16. The appropriate documents for the passage of title to automobiles required by California Vehicle Code § 5600(b) is a Report of Sale.

17. The Purchase Agreements provide:

> "[The buyer] agree(s) that the following additional terms and conditions shall govern this purchase order . . . D. That title to the vehicle shall not pass to you until payment in full is made in cash."

18. The Purchase Agreements also provide:

> "SECURITY: [The buyer is] giving a security interest in the goods or property being purchased."

19. The Purchase Agreements also provide:

> "You agree that the following additional terms and conditions shall govern this purchase order and any security agreement or contract for financing executed in connection with this purchase: A. SECURITY INTEREST: [The buyer] hereby grant(s) [the seller] a security interest under the California Uni-

> form Commercial Code in the vehicle and all parts or accessories put on the vehicle and in all insurance premiums financed for [the buyer] or rebates from insurance premiums, service contracts, and in the proceeds of any insurance policies covering the vehicle or credit or disability insurance policies financed hereunder, which security interest secures all sums which may become due under this contract, as well as any modifications, extensions, renewals, amendments, or re-financing of it."

20. In connection with the sale of the BMWs, Pacific BMW received automobile purchase drafts from Debtor.

21. Automobile purchase drafts are instruments commonly used in the automobile industry for sales by distributors to dealers, or between two dealers, as a means of arranging for payment. The drafts are presented to the buyer's bank together with a Report of Sale. The bank then honors the draft and issues its own check to the seller in payment, debiting the buyer's account and delivering to the buyer the Report of Sale. Thus, the buyer does not have access to the title documents until the vehicles are paid for.

22. It was Pacific BMW's experience that Debtor's bank, Manilla Bank, was slow in processing and paying automobile purchase drafts.

23. It was a common practice of Pacific BMW and Debtor that automobile purchase drafts would be given at the time of a sale of an automobile but that the draft would not be presented to Manilla Bank by Pacific BMW. Instead, the drafts and the title transferring documents would be held by Pacific BMW and later exchanged for checks delivered by Debtor. This arrangement was preferable to Pacific BMW because it was faster than waiting for Manilla Bank to process the drafts.

24. In connection with the sale of the BMWs, the agreement of the parties was that Pacific BMW would

hold the automobile purchase drafts and exchange them for checks delivered by Debtor.

25. By July 28, 1988 Debtor still had not given Pacific BMW checks for the BMWs. As a result, Pacific BMW still held the automobile purchase drafts and had not delivered the necessary papers to transfer ownership of the BMWs to Debtor.

26. On July 28, 1988, when Debtor was asked by Pacific BMW for the checks, it notified Pacific BMW that it could not pay for the BMWs. In a telephone conversation with Pacific BMW's David Ho, Debtor's general manager agreed to return the BMWs to Pacific BMW.

27. Later, Debtor's inventory manager and other employees voluntarily delivered possession of the BMWs to Pacific BMW. Specifically, Debtor's employees obtained the keys for the BMWs from an enclosed room and assisted Pacific BMW's drivers in locating and removing the BMWs from Debtor's premises.

28. Another employee of Debtor prepared a "Statement of Facts" reflecting the delivery, which was signed by a representative of Pacific BMW. A portion of the "Statement of Facts," wherein Pacific BMW agrees to hold an affiliate of Debtor "free from any and all charges occurred in this transaction," and to hold "Manilla Bank, Grand Wilshire Group of Companies free (sic) any loss that they may suffer resulting from this transaction" was crossed out by Pacific BMW.

29. Pacific BMW also returned the original automobile purchase drafts to Debtor, and they are now in the possession of the Trustee.

30. Debtor never paid Pacific BMW for the BMWs.

31. Pacific BMW never delivered the Reports of Sale with respect to the BMWs.

32. After July 28, 1988 Debtor acted consistently as if the Purchase Agreements had been rescinded.

33. On or about August 5, 1988, Debtor commenced its bankruptcy case by filing a voluntary petition under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code".)

34. On August 11, 1988, Irving Sulmeyer (the "Trustee") was appointed as the chapter 11 trustee for Debtor.

35. Pursuant to section 546 of the Bankruptcy Code, the last date by which the Trustee could bring an action or proceeding under section 544, 545, 547, 548 or 553 of the Bankruptcy Code in Debtor's bankruptcy case was August 11, 1990.

36. On August 6, 1990, the Trustee filed a complaint to recover alleged preferential transfers (the "Complaint") against Pacific BMW pursuant to section 547 of the Bankruptcy Code in the United States Bankruptcy Court for the Central District of California (the "Bankrutcy Court"), seeking a judgment for the value of the BMWs and five other automobiles (the "Other Automobiles"). No other allegations or claims for relief were made in the Complaint.

37. Pacific BMW answered the Complaint on September 18, 1990 and on December 17, 1990 filed its Motion for Summary Judgment or, in the Alternative, for Summary Adjudication of Issues (the "Summary Judgment Motion").

38. The Summary Judgment Motion was originally heard on January 8, 1991 and continued to September 23, 1991. On or about June 7, 1991, the Trustee filed his Cross Motion for Summary Judgment (the "Cross Motion"). The Cross Motion was supported by the Declaration of John A. Baer, to which Pacific BMW filed evidentiary objections (the "Baer Declaration").

39. On September 23, 1991, the Bankruptcy Court took the Summary Judgment Motion and the Cross Motion under submission.

40. On February 3, 1992, the Bankruptcy Court entered its order and judgment denying the Summary Judgment Motion with respect to the BMWs and granting it with respect to the Other Automobiles, granting the Cross Motion with respect to the BMWs and denying it with respect to the Other Automobiles, and overruling Pacific BMW's objections to the Baer Declaration (the "Summary Judgment").

41. Pacific BMW timely filed its Notice of Appeal of the Summary Judgment on February 7, 1992.

42. On February 19, 1992, Pacific BMW timely filed its Objection to Jurisdiction of Bankruptcy Appellate Panel.

43. The Trustee did not appeal the Summary Judgment.

44. The Other Automobiles are not relevant to the appeal before this Court.

45. John A. Baer is an employee of the Trustee.

46. John A. Baer has no personal knowledge of Debtor or its books and records, or its custom and practice of doing business prior to the commencement of Debtor's bankruptcy case.

47. Any conclusion(s) of law set forth below which is/are deemed to be a finding of fact shall be incorporated herein.

CONCLUSION OF LAW

A. In deciding motions for summary judgment, this Court follows Federal Rule of Civil Procedure 56(c), which is made applicable in this matter by Federal Rule of Bankruptcy Procedure 7056, and the following cases: *Celotex Corp v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348

(1986); *Harper v. Wallingford,* 877 F.2d 728 (9th Cir. 1989); *Cal. Arch. Bldg. Prod. v. Franciscan Ceramics,* 818 F.2d 1466 (9th Cir. 1987); and *Neely v. St. Paul Fire and Marine Ins. Co.,* 584 F.2d 341 (9th Cir. 1978).

B. A grant of summary judgment is reviewed *de novo* by an appellate tribunal. *Lippi v. City Bank,* 955 F.2d 599 (9th Cir. 1992); *Isom v. United States Internal Revenue Service (In re Isom),* 901 F.2d 744 (9th Cir. 1990).

C. A decision of the bankruptcy court will be reversed by the district court only if there is a finding that the decision is clearly erroneous or contrary to law.

D. In order for a transfer to be avoidable under section 547(b) of the Bankruptcy Code, all of the elements set forth in section 547(b) must be established. *U.S. v. Daniel (In re R & T Roofing Structures & Commercial Framing),* 887 F.2d 981 (9th Cir. 1990); *First Potter County Bank v. Hogg (In re Hogg),* 35 B.R. 292 (Bankr. D.S.D. 1987).

E. The plaintiff in a preference action has the burden of proving each element of section 547(b) of the Bankruptcy Code by a preponderance of the evidence.

F. Under section 547(b), to be avoidable, a transfer must be, among other things, of an interest of the debtor in property. *Begier v. IRS,* 496 U.S. 53, 110 S. Ct. 2258 (1990).

G. The determination of whether a contract is executory under the Bankruptcy Code is a question of federal law. *Griffel v. Murphy (In re Wegner),* 839 F.2d 533 (9th Cir. 1988).

H. Executory contracts are contracts where the obligations of the parties thereunder are so far underperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other.

I. If both Pacific BMW and Debtor had meaningful performance remaining on July 28, 1992, the Purchase Agreements were executory.

J. Pacific BMW's obligation to deliver the Reports of Sale was a material obligation that Pacific BMW would have been mandated to perform had Debtor completed the sale.

K. The Notices of Sale filed by Pacific BMW did not act as substitutes for the requisite Reports of Sale.

L. Pacific BMW had not completed performance on July 28, 1988.

M. The past custom and practice of the parties in a continuing business relationship is relevant in determining the appropriate conduct of the parties.

N. By submitting only the automobile purchase drafts, Debtor had not fully performed its obligations under the Purchase Agreements.

O. If, as asserted by the Trustee, Debtor fully paid for the BMWs by submitting automobile purchase drafts when it took possession of the BMWs, the Complaint would be fatally flawed because then there would be no antecedent debt as required by section 547(b) of the Bankruptcy Code.

P. The Purchase Agreements were executory contracts.

Q. As executory contracts, the Purchase Agreements could be rescinded by mutual consent of the parties.

R. Mutual cancellation by the parties to an executory contract is permitted under California law.

S. Pacific BMW's excise of certain language from the Statement of Facts does not indicate that Pacific BMW did not intend to rescind the Purchase Agreements.

T. Although mutual rescission of a written contract must be supported by consideration, mutual cancellation

of executory contractual rights is sufficient consideration. *Sass v. Hank,* 108 Cal. App. 2d 207 (1951).

U. The Purchase Agreements were rescinded by mutual consent of the parties.

V. Since the Purchase Agreements were executory, there can be no preference liability.

W. Upon rescission, Debtor gave up all right, title and interest in the BMWs, which renders section 547 of the Bankruptcy Code inapplicable because there was no interest of Debtor or its estate implicated.

X. Title to the BMWs never passed from Pacific BMW.

Y. Because title to the BMWs never passed to Debtor, there was no transfer of an interest of Debtor in property on July 28, 1988.

Z. Assuming that Debtor obtained an ownership interest in the BMWs, Pacific BMW held a valid security interest in the BMWs.

AA. Pacific BMW's security interest in the BMWs had attached under the California Uniform Commercial Code.

AB. Pacific BMW's security interest was binding against Debtor.

AC. If the Trustee had brought an action against Pacific BMW under section 544(a) of the Bankruptcy Code, it would have been his burden to demonstrate lack of perfection of Pacific BMW's security interest.

AD. Because the Trustee did not sue to set aside Pacific BMW's security interest within the applicable statute of limitations, the Trustee cannot attack any lack of perfection of the security interest held by Pacific BMW.

AE. Because Pacific BMW had a valid security interest in the BMWs, it cannot be subject to a preference

attack since, upon liquidation of the collateral, Pacific BMW would have been paid in full and the Trustee cannot prove the element set forth in section 547(b)(5) of the Bankruptcy Code.

AF. Since Pacific BMW held title or a valid security interest in the BMWs, it cannot be subject to a preference attack under section 547(b) of the Bankruptcy Code.

AG. John A. Baer is not a custodian of Debtor's books and records within the meaning of Federal Rule of Evidence 803(6).

AH. The Declaration of John A. Baer filed by the Trustee in support of the Cross-Motion is inadmissible hearsay.

AI. The Summary Judgment with respect to the BMWs was clearly erroneous and contrary to law.

AJ. Pacific BMW is entitled to summary judgment in its favor as a matter of law.

AK. Any finding(s) of fact set forth above which is/are deemed to be a conclusion of law shall be incorporated herein.

DATED: Sep. 1, 1992

/s/ Dickran Tevrizian, Jr.
DICKRAN TEVRIZIAN, JR.
United States District Judge

APPENDIX D

[Filed Jan. 29, 1992]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. LA 88-16590-CA
Chapter 11

And Substantively Consolidated Cases:

LA 88-16654-CA
LA 88-16450-CA
LA 88-16451-CA
LA 88-19447-CA

Adv. No. LA 90-01730-CA

IN RE GRAND CHEVROLET, INC., and
RELATED ENTITIES, INCLUDING:

1. GRAND MOTORS, INC.;
2. GRAND WILSHIRE FINANCE CORPORATION;
3. GRAND RIZAL FINANCE CORPORATION;
4. GRAND WILSHIRE CAPITAL, INC.,

Debtors.

IRVING SULMEYER, Chapter 11 Trustee,
Plaintiff,

vs.

PACIFIC BMW,
Defendant.

SUMMARY JUDGMENT

The Motion for Summary Judgment filed by Defendant Pacific BMW and the Cross-Motion for Summary Judgment filed by Plaintiff Irving Sulmeyer, Chapter 11 Trustee, were heard on September 23, 1991 at 3:00 p.m. in Courtroom 8529 at the Federal Building, 300 N. Los Angeles Street, Los Angeles, California 90012. Pamela Webster of Buchalter, Nemer, Fields & Younger appeared on behalf of Defendant Pacific BMW; Steven R. Wainess of Sulmeyer, Kupetz, Baumann & Rothman, a Professional Corporation appeared on behalf of Plaintiff Irving Sulmeyer, Trustee.

The court considered the papers in support of and in opposition to Defendant's Motion for Summary Judgment and the papers in support of and opposition to the Plaintiff's Cross-Motion for Summary Judgment, the arguments and representation of counsel, and the facts and circumstances of this case. This judgment is based upon separate findings of fact and conclusions of law.

IT IS HEREBY ORDERED:

1. That Defendant's Motion for Summary Judgment is denied.

2. That Plaintiff's Cross-Motion for Summary Judgment is granted in favor of Plaintiff.

3. That judgment is granted in favor of Plaintiff Irving Sulmeyer, Trustee against Defendant Pacific BMW in the amount of $411,870 plus interest at the legal rate from August 6, 1990 until paid.

DATED: January 29, 1992

/s/ C.K. Ashland
CALVIN K. ASHLAND
United States Bankruptcy Judge

APPENDIX E

[Filed Jan. 29, 1992]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. LA 88-16590-CA
Chapter 11

And Substantively Consolidated Cases:

LA 88-16654-CA
LA 88-16450-CA
LA 88-16451-CA
LA 88-19447-CA

Adv. No. LA 90-01730-CA

IN RE GRAND CHEVROLET, INC., and
RELATED ENTITIES, INCLUDING:

1. GRAND MOTORS, INC.;
2. GRAND WILSHIRE FINANCE CORPORATION;
3. GRAND RIZAL FINANCE CORPORATION;
4. GRAND WILSHIRE CAPITAL, INC.,

Debtors.

IRVING SULMEYER, Chapter 11 Trustee,
Plaintiff,

VS.

PACIFIC BMW,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the Court's consideration of the papers in support of and opposition to Defendant's Motion for Summary Judgment and the papers in support of and opposition to Plaintiff's Cross-Motion for Summary Judgment, and the argument of counsel for the parties, the court makes the following determinations:

FINDINGS OF FACT

1. Grand Chevrolet, Inc. (Grand) purchased 13 vehicles from Pacific BMW (Pacific). A summary of the 13 vehicle transactions sets forth: (1) the make of the vehicle; (2) the date of the purchase of the vehicle; (3) the inventory stock number assigned to each vehicle as it was received by Grand; (4) the time draft number given to Pacific; (5) the date of the time draft issued by Grand for each of the vehicles received; (6) the draft time (number of days within which Grand must make payment to Pacific after presentment of the draft to Manila Bank); and (7) the date of the sales contract between Grand and Pacific.

No.	Make of Vehicle	Date of Purchase	Stock No.	Draft No.	Date of Draft	Draft Time	Date of Sales K
1.	BMW	7/10/88	M8466	1686	7/8/88	15 Days	7/8/88
2.	BMW	7/10/88	M8465	1685	7/8/88	15 Days	7/8/88
3.	BMW	7/7/88	M8418	1682	7/7/88	15 Days	7/6/88
4.	BMW	7/8/88	M8419	1681	7/7/88	15 Days	7/6/88
5.	BMW	7/7/88	M8416	1684	7/7/88	15 Days	7/6/88
6.	BMW	7/8/88	M8421	1679	7/7/88	30 Days	7/6/88
7.	BMW	7/8/88	M8423	1677	7/7/88	30 Days	7/6/88
8.	BMW	7/8/88	M8425	1675	7/7/88	30 Days	7/6/88
9.	BMW	7/8/88	M8424	1676	7/7/88	30 Days	7/6/88
10.	BMW	7/8/88	M8422	1678	7/7/88	30 Days	7/6/88
11.	BMW	7/8/88	M8420	1680	7/7/88	30 Days	7/6/88
12.	BMW	7/7/88	M8417	1683	7/7/88	15 Days	7/6/88
13.	BMW	7/8/88	M8426	1674	7/7/88	15 Days	7/6/88

2. An automobile purchase draft was delivered to Pacific by Grand at or around the time of the physical delivery of each of the vehicles.

3. None of the time drafts given by Grand in connection with the 13 vehicles were ever deposited or presented to Manila Bank for payment. The total amount paid by Grand to Pacific pursuant to the time drafts on the 13 vehicles is $411,870.

4. A Notice of Sale or Transfer of Vehicle and Odometer Mileage Statement was prepared and signed by Pacific and an original buyer's yellow carbon copy was given to Grand on all 13 vehicles.

5. "Pacific" is listed on each Notice of Sale as the "seller" regarding the 13 BMW's sold to Grand.

6. Pacific never filed a Financing Statement with the California Secretary of State within ten days after Grand took possession of each of the vehicles.

7. Pacific repossessed the 13 vehicles from the Grand's premises on July 28, 1988.

8. Pacific was a creditor of Grand at the time Pacific repossessed the 13 vehicles on July 28, 1988.

9. Pacific accepted Grand's time drafts as "payments" for the 13 vehicles, and based on such payments executed the Notices of Sale which were delivered to Grand.

10. No further contractual duties remained to be performed by Grand on the vehicle transactions until 15 or 30 days *after* Pacific presented the time drafts to Manila Bank.

11. After executing the Notices of Sale, no contractual duties remained to be performed by Pacific.

12. Grand and Pacific did not mutually terminate the vehicle transactions on July 28, 1988.

13. Grand did not receive any consideration as a result of the repossession of the vehicles by Pacific.

14. Pacific did not relinquish any contractual rights it potentially held against Grand at the time Pacific repossessed the vehicles on July 28, 1988.

15. David Ho, an officer of Pacific, executed two declarations on behalf of Pacific on July 28, 1988, acknowledging that Pacific took possession of the vehicles on July 28, 1988 from Grand.

16. On August 5, 1988, Grand Chevrolet, Inc. commenced its bankruptcy case by filing a voluntary petition under Chapter 11.

17. On August 8, 1988, Grand Motors, Inc. commenced its bankruptcy case by filing a voluntary petition under Chapter 11.

18. Irving Sulmeyer was appointed as the Chapter 11 Trustee of Grand Chevrolet, Inc. and Grand Motors, Inc. on August 11, 1988.

19. Glendale Mitsubishi and Pacific Suzuki sold certain other automobiles to Grand. These other automobiles also were repossessed. The trustee did not sue Glendale Mitsubishi and Pacific Suzuki within the applicable period of limitations.

20. Any conclusion of law set forth below which is deemed to be a finding of fact shall be incorporated as a finding of fact.

CONCLUSIONS OF LAW

1. New, unregistered vehicles are controlled by the California Commercial Code.

2. Pacific never perfected a security interest in any of the vehicles under California Commercial Code § 2401.

3. Even under the California Vehicle Code, title to the vehicles was transferred to Grand by Pacific via Pacific's execution of the respective notices of sale pursuant to California Vehicle Code § 5901.

4. Grand held title to the vehicles upon delivery of the respective vehicles and the exchange of the respective automobile purchase drafts given by Grand.

5. There was never an effective rescission of the sale of the vehicles.

6. Pacific's repossession of the vehicles on July 28, 1988 was a "transfer" under 11 U.S.C. § 101(54).

7. Each of the vehicles in question are property of the Grand estates.

8. Pacific was a creditor of Grand at the time of the repossessions by Pacific.

9. Pacific's repossessions of the vehicles were on account of antecedent debts owed by Grand.

10. The Grand entities were insolvent on July 28, 1988.

11. Pacific's repossession of the vehicles will allow Pacific to receive more than it would have received had the case been a case under Chapter 7, had the transfers not been made and had Pacific received payment of the debts to the extent provided by Title 11.

12. The transfers or repossessions, or both, were to or for the benefit of Pacific.

13. As of July 28, 1988, there were no executory rights or duties remaining to be performed by Grand or Pacific.

14. There were no material breaches existing between Grand and Pacific as of July 28, 1988.

15. The automobile purchase drafts given to Pacific by Grand in exchange for the vehicles were never dishonored under the California Commercial Code.

16. The trustee may avoid each of the transfers or repossessions, or both, by Pacific under 11 U.S.C. § 547 (b).

17. Judgment should be entered in favor of Plaintiff Irving Sulmeyer, Chapter 11 Trustee, and against Defendant Pacific BMW in the amount of $411,870 plus interest at the legal rate from August 6, 1990 until paid based on Plaintiff's Cross-Motion for Summary Judgment. Defendant's Motion for Summary Judgment is denied.

18. Any finding of fact set forth above which is deemed to be a conclusion of law shall be incorporated as a conclusion of law.

DATED: January 29, 1992

/s/ C. K. Ashland
CALVIN K. ASHLAND
United States Bankruptcy Judge

OCT 4 1994
OFFICE OF THE CLERK

No. 94-376

In The

Supreme Court of the United States

October Term, 1994

IRVING SULMEYER, CHAPTER 11 TRUSTEE,

Petitioner,

v.

PACIFIC BMW,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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No. 94-376

In The

Supreme Court of the United States

October Term, 1994

IRVING SULMEYER, CHAPTER 11 TRUSTEE,

Petitioner,

v.

PACIFIC BMW,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Respondent Pacific BMW respectfully asks the Court to deny the Petition for Writ of Certiorari for the reasons stated below.

STATEMENT OF THE CASE

Petitioner's Statement of the Case in the Petition contains an error that requires correction. Petitioner states that the Ninth Circuit Court of Appeals applied "state laws involving rescission, rather than the federal preference laws" in this case. Petition at 4. In actuality, the Ninth Circuit, like the court below it, looked to the

laws of the State of California in order to determine whether the debtor had an interest in the property it transferred to Respondent pre-bankruptcy. The federal bankruptcy laws do not address what constitutes an interest of a debtor in property. Thus, the Ninth Circuit did not choose state law over federal law in making its determination. Instead, it merely used state law to help apply federal preference law.

SUMMARY OF ARGUMENT

This case does not present any issues that merit review by this Court. Contrary to the arguments in the Petition, the Ninth Circuit's decisions will not noticeably impact the administration of bankruptcy cases. Further, contrary to the arguments in the Petition, this is not a case of federal preemption. Finally, contrary to the arguments in the Petition, there is no conflict among the Circuit Courts of Appeal.

Succinctly stated, Section 547 of Title 11 of the United States Code (11 U.S.C. § 101 *et seq.*) allows a bankruptcy trustee to recover certain pre-bankruptcy transfers of property of the debtor. Federal bankruptcy law does not define what is or is not property of a debtor and has not, therefore, preempted the issue. Instead, the determination of whether the debtor had an interest is property is made by reference to applicable state law, if any. This does not create a conflict. Because the laws of the various states differ, the need to look to state law created by the

silence in the federal statute naturally means that different results may attend depending on which state's laws control.

In this matter, the Ninth Circuit properly referred to the laws of the State of California to determine if the debtor had a interest in the property it transferred to Respondent, which consisted of thirteen automobiles. Under California law, the debtor did not have an interest in the automobiles. Accordingly, the Ninth Circuit affirmed the decision of the District Court and found that no preference existed. Although the result may have been different had another state's laws been applied, there is no constitutional issue implicated.

Further, Petitioner grossly overstates the importance of the Ninth Circuit's unpublished decision in this case. As stated, the determination of the debtor's property interests was based on an application of California's very specific motor vehicle title statute. Similarly, *Griffel v. Murphy (In re Wegner)*, 839 F.2d 533 (9th Cir. 1988), criticized by Petitioner, was based on an interpretation of Montana's very specific livestock statute. These interpretations do not have widespread application.

Finally, there is no conflict between or among the Circuits that calls for resolution by this Court. Rather, the Circuits are in perfect accord. If under the law of the applicable state the property transferred was property of the debtor, all Circuits would likely find preference liability. If under the applicable state law the property was not property of the debtor, no Circuit would find liability.

REASONS FOR DENYING THE PETITION

I. THIS COURT'S OPINION IN *BUTNER* DOES NOT CONFLICT WITH *WEGNER*

In the Petition, the Trustee cites this Court's opinion in *Butner v. United States*, 440 U.S. 48 (1979) for the proposition that if a state law conflicts with a federal bankruptcy law, the state law is suspended to the extent of actual conflict. Respondent does not take issue with the fact that the Constitution gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States (U.S. Const. art. I, § 8), or with the impact of the Supremacy Clause (U.S. Const. art. VI, cl. 2). Respondent cannot, however, see how the Ninth Circuit's ruling in *Wegner*, upon which the decision in this case was based, evidences any violation of the Constitution.

A critical element of an avoidable preferential transfer under 11 U.S.C. § 547(b) is that an interest of the debtor in property be transferred pre-bankruptcy. As a noted commentator has stated, "The term 'interest of the debtor in property' is not defined in the Bankruptcy Code, however, and thus, '[w]e look to state law to determine whether property is an asset of debtor'." 4 *Collier on Bankruptcy* ¶ 547.03 at 547.22.1-22.2 (15th ed. 1992), footnotes omitted, citing *Kallen v. Ash, Anos, Freedman & Logan (In re Brass Kettle Restaurant, Inc.)*, 790 F.2d 574, 575 (7th Cir. 1986) ("We look to state law to determine whether property is an asset of a debtor."); *Wegner*; *Riddervold v. Saratoga Hosp. (In re Riddervold)*, 647 F.2d 342, 346 (2d Cir. 1981); and *In re Coppie*, 728 F.2d 951, 952-53

(7th Cir. 1984), *cert. denied sub nom.* 469 U.S. 1105 (1985). This does not create a conflict between the state and federal laws, nor does it run afoul of the doctrine of federal preemption. If in adopting the Bankruptcy Code, Congress signaled its intent to defer to and incorporate state law, then there can be no conflict. *See United States v. Hall*, 543 F.2d 1229, 1232 (9th Cir. 1976) ("The state law cannot preempt the federal unless the federal act itself sanctions the application of state standards."), *cert. denied*, 429 U.S. 1075 (1977).

Indeed, the very case relied on by Petitioner deferred to state law to determine property rights. The dispute in *Butner* was a bankruptcy trustee's and a mortgagee's competing claims to rents collected after the commencement of a bankruptcy case. The issue was whether the determination should be resolved by reference to state law, or whether there should be a uniform federal approach.

This Court noted that a split existed among the Circuits. The majority view of the Circuit Courts was that the issue should be resolved by reference to state law even though "[b]ecause the applicable law varies from state to state, the results in federal bankruptcy proceedings will also vary under the approach taken by most of the Circuits." *Id.* at 53. The minority of the Circuits adopted a federal rule of equity that varied the result that otherwise would be achieved under some state laws. "Those courts reason that since the bankruptcy court has the power to deprive the mortgagee of his state-law remedy, equity requires that the right to rents not be dependent on state-court action that may be precluded by federal law." *Id.*

This Court unanimously agreed with the majority view stating that although certain security interests and transfers can be set aside under bankruptcy law, "Congress has generally left the determination of property rights in the assets of a bankruptcy's estate to state law." *Id.* at 54. Further, quoting from *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918), in *Butner* this Court stated:

> Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States. For example, the Bankruptcy Act recognizes and enforces the laws of the States affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all States.

Id. at 54 n. 9.

In *Wegner* and in this case the Ninth Circuit did exactly what *Butner* and the other decisions cited by Collier did. It looked to state law to answer the question left unaddressed by Congress: What constitutes an interest of the debtor in property? California has very specific laws governing the transfer of an interest in an automobile including explicit and material obligations of the seller that far exceed those required of a typical seller of goods. Montana has similarly specific laws concerning the transfer of livestock. Based on those detailed laws, the Ninth Circuit found in each case that neither party had fully performed their contractual obligations, the result of

which was that the sales contracts could be mutually rescinded. The uncontroverted evidence adduced by the trial court was that the parties had in fact mutually rescinded their contracts. Therefore, by proper application of controlling state laws, the Ninth Circuit found one element of preference liability missing.

The trustee also argues that *Wegner* and this case conflict with federal law because they defeated a trustee's ability to recover an otherwise avoidable preference. Petition at 11. Firstly, the record will not support a finding that there was an otherwise avoidable preferential transfer. The District Court reversed the Bankruptcy Court on three separate grounds only one of which was addressed by the Ninth Circuit. *Compare* Appendix A and Appendix B. Secondly, even though the reference to state law may result in a smaller estate because otherwise avoidable preferences cannot be recovered, it does not cause a conflict with federal law or with the Constitution. *Butner,* 440 U.S. at 54 n. 9.

In sum, the approach used by the Ninth Circuit in *Wegner* and in this case was sound and does not need to be reviewed by this Court.

II. THE NINTH CIRCUIT'S RULINGS DO NOT HAVE THE DRACONIAN IMPACT PETITIONER SUGGESTS

Petitioner would have the Court believe that the Ninth Circuit decisions in *Wegner* and in this case (i) encourage creditors to improperly camouflage a pre-petition transfer as a rescission in order to avoid preference liability, (ii) destroy the ability of bankruptcy trustees to

recover preferential transfers, and (iii) cause chaos in the administration of bankruptcy cases. Petition at 5. This is gross hyperbole.

This case concerned a technical application of California's motor vehicle registration law. *Wegner* was a technical application of Montana's livestock transfer law. The Ninth Circuit's holdings in each case have no application to garden variety sales of goods even if those goods are returned to the seller pre-petition because in most situations the seller has fully performed when the goods are delivered. The seller's full performance would defeat mutual rescission under the Ninth Circuit's analysis.

No greater evidence of these decisions' narrow utility is there than the fact that since *Wegner* was decided in 1988, it has been cited as authority in only one other published preference decision, and then only in passing. *See Ralar Distributors, Inc. v. Rubbermaid, Inc. (In re Ralar Distributors, Inc.)*, 4 F.3d 62, 68 (1st Cir. 1993). Surely if it were the deathknell for preference recoveries by a bankruptcy estate, it would have drawn more attention.

III. THE CIRCUITS ARE NOT IN CONFLICT

Petitioner argues that *Wegner* is inconsistent with the opinion of the Second Circuit Court of Appeals in *Marks v. Goodyear Rubber Sundries, Inc.*, 238 F.2d 533 (2d Cir. 1956) and the opinion of the Tenth Circuit Court of Appeals in *Bar Control of Colorado v. Gifford (In re Colacci's of America, Inc.)*, 490 F.2d 1118 (10th Cir. 1974). Petitioner

is not correct; the decisions are not inconsistent. In fact, they do not even address the same issues.

The question in *Wegner* was whether the debtor had an interest in the property transferred. In *Marks*, the Second Circuit examined whether the creditor had reasonable cause to believe the debtor was insolvent when the property, the nature of which was not identified, was returned to the seller. That the debtor had an interest in the property was apparently presumed because the issue was not discussed in the opinion. If it was not property of the debtor, the holding in *Marks* should have been the same as in *Wegner*. Conversely, if in *Wegner* the Ninth Circuit had found that the cattle were property of the debtor when they were returned, like *Marks* it too would have found preference liability.

In *Colacci's*, there was a specific finding by the trial court that the debtor had title to bar equipment at the time it was delivered back to the seller, which finding was not challenged on appeal. Instead, the question at issue was whether the seller was reclaiming or repossessing the equipment. If the equipment was not the debtor's, presumably the Tenth Circuit would also have ruled that there was no preferential transfer. Conversely, if the Ninth Circuit had found that the cattle were property of the debtor when they were returned, like *Colacci's* it too would have found preference liability.

Hence, since there is no conflict among the Circuits on the issue addressed in *Wegner*, there is even less reason for this Court to grant the Petition.

CONCLUSION

For the foregoing reasons, Respondent submits that the Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

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